intention to abrogate the special provision of Section 21 *a*, to the details of which it had previously given its careful attention. It is therefore submitted that, aside from the obviously deplorable consequence of the decision of *In re Kessler*,[18] tending, as it does, to emasculate the Bankruptcy Act to a considerable extent, the opinion of Judge Thompson cannot be sustained when tested by the accepted principles of law applicable to the subject of statutory repeal by implication.[19]

A correct statement of the law as to the competency of witnesses in bankruptcy proceedings, it is submitted, is the following: The competency of persons to testify in bankruptcy is governed by the law of the state wherein the particular proceedings are pending, except that, regardless of state law, the wife of the bankrupt may be examined concerning business transacted by her with or for the bankrupt, or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

L. E. L.

CONTRACTS — TERMINATION — WHEN ARE SERVICES "SATISFACTORY"?—Contracts of hiring frequently embrace stipulations to the effect that the employee may be dismissed if his services are not performed in a manner satisfactory to the other party. These so-called "satisfaction contracts" have been fruitful sources of litigation owing to the difficulty of ascertaining what constitutes "satisfaction," which is, in reality, a mental condition. The conclusions reached by the courts are not in harmony.

The first discordant note is struck in determining whether the employer discharging the employee on the ground that his services are not satisfactory must have good reasons for such dissatisfaction. The great weight of authority is that he need not have reasonable grounds therefor.[1] One of the principal reasons for this seems to be that although the employee may have been injudicious or indiscreet in undertaking to work for a compensation

[18] *Supra*, note 1.

[19] The two cases cited by the learned judge in support of his position do not decide that Section 21 *a* has been superseded by the Act of 1906. *In re* Thompson, 197 Fed. 681 (1912), does not consider the question of the wife's competency at all, and applies the Act of 1906 to an entirely different situation. Although *In re* Hoffman, 199 Fed. 448 (1912), does deal with the competency of the wife, it merely decides that the wife is a compellable witness even according to the laws of New Jersey, and that she is *a fortiori* a competent witness in bankruptcy proceedings pending in that state.

[1] Mackenzie v. Minis, 132 Ga. 323 (1909), 23 L. R. A. (N. S.) 1003; Corgan v. Lee Coal Co., 218 Pa. 386 (1907), 11 Am. & Eng. Ann. Cas. 838; Isbell v. Anderson Coal Co., 170 Mich. 304 (1912); Beissel v. Vermillion Farmers' Elevator Co., 102 Minn. 229 (1907), 12 L. R. A. (N. S.) 403.

which is dependent upon a contingency so doubtful as the satisfaction of the other party, yet, having voluntarily assumed the obligations and the risk of the contract, his legal rights are to be determined solely according to its provisions. The courts will not make a new contract for the parties.[2]

Another reason is that as the word "satisfaction" refers to a mental condition, the parties must have intended, upon entering into the contract, that it was the mental condition of the employer rather than that of a court or jury which was referred to.[3] Moreover, as dissatisfaction is a state of mind it is extremely difficult for the employer to prove the reasons leading to it, and to make him do so would practically annul this clause of the contract, for, without such a clause, he would have the right to dismiss the employee, if he did not properly perform his duties.[4] But there is some authority for the position that the employer upon discharging an employee because his services were not satisfactory as provided in the contract, must have good reasons for his dissatisfaction and particularly if the surrounding circumstances show that such was the intention of the parties, the employer must show that he had a reasonable cause for his dissatisfaction.[5]

The next point in controversy is whether the employer must in good faith be dissatisfied with the services of the employee or whether he has an absolute right to discharge the employee. It would seem that in attempting to prove good faith, from the very nature of the case, the employer would have to show the reason for his dissatisfaction and thus there would be a conflict with the rule, which, as we have seen, provides that he need not have reasonable grounds for his dissatisfaction. But, on the other hand, to allow the employer to discharge the employee on the ground that his services are not satisfactory and not to require that the dissatisfaction be *bona fide,* would practically permit the employer to terminate the contract on any pretext whatever, even in cases where, as a matter of fact, he was not dissatisfied with the services rendered. But this would conflict with the principle that the employer cannot discharge for other causes under the pretext that he is not satisfied.[6] The view generally taken by the courts is that the dissatisfaction of the employer must be real and arrived at in good faith.[7]

[2] Gibson v. Cranage, 39 Mich. 50 (1878); Brown v. Foster, 113 Mass. 139 (1873).

[3] Tyler v. Ames, 6 Lans. 281 (N. Y. 1872).

[4] Allen v. Mutual Compress Co., 101 Ala. 574 (1893).

[5] Bridgeford v. Meagher, 144 Ky. 479 (1911); Beggs v. Fowler, 82 Mo. 599 (1884), where the standard of satisfaction was stated inferentially in the contract.

[6] Alexis Stoneware Mfg. Co. v. Young, 59 Ill. App. 226 (1895); Richardson v. School District No. 10, 38 Vt. 602 (1866).

[7] Parr v. Northern Electrical Mfg. Co., 117 Wis. 278 (1903). See also cases cited in note 1, *supra.*

There is great difficulty, however, in segregating the cases in which the employer's dissatisfaction is merely unreasonable and those in which it is non-existent, especially under those contracts where the employment is of such a nature that it involves the effort to satisfy the personal taste of the employer. No doubt it is this difficulty which has led to the following rule: "If the employment is of the class involving taste, fancy, interest, personal satisfaction or judgment, the question whether the services of the employee are satisfactory is to be determined solely by the employer and not by the court or jury. But where the employment is not of that class, and where the master has the power to discharge the employee if satisfied that he is incompetent, there the good faith is a question of fact which must be submitted to the jury." [8] It is submitted, however, that even in cases involving personal taste, although the employer is to be sole judge of his satisfaction, yet it is proper to require him to exercise good faith, otherwise the clause, "if the services are satisfactory," would be given a meaning foreign to the real intention of the parties. The presence of the element of personal taste or fancy would seem merely to be a circumstance indicative of the employer's intention to be the sole judge of the reasonableness of his satisfaction and should not bear on the question of good faith.

A recent English case is illustrative of the generally accepted doctrine. A contract of employment was entered into containing this provision: "The engagement will be for one year, subject, of course, to your carrying out your duties to the satisfaction of the directors and to economical costs of production." The employee was discharged within the year on the ground that his services were unsatisfactory. In a suit against the employer for wrongful dismissal, the jury found that the defendants were in fact really and genuinely dissatisfied with the plaintiff's discharge of his duties but that they did not have good reasons for such dissatisfaction. Upon these findings, judgment was held to be correctly entered for the defendant employer, it not being necessary under such a contract for the jury to find reasonable cause for the dissatisfaction.[9] But in the course of his opinion Mr. Justice Lawrence said: "The only sense of reasonableness in the matter is this: if it can be said that a reasonable man could not honestly come to the conclusion, then a ground for saying he came to the conclusion dishonestly is made out; but if you admit that a reasonable man could come to the conclusion, the only question is did he in fact, and the decision is for him and not for the jury." This quotation shows, as has been said before, that when it comes to prove good faith, an inquiry must

[8] Saxe v. Shubert Theatrical Co., 57 Misc. 622 (N. Y. 1908). See also Crawford v. Mail & Express Publishing Co., 163 N. Y. 404 (1900), Vann, J., dissenting.

[9] Diggle v. Ogston Motor Co., 112 L. T. 1029 (Eng. 1915).

be made to some extent into the reasonableness of the employer's dissatisfaction.

The problem of the preceding discussion is again involved in the construction of a provision that title shall be "satisfactory" to the vendee in an executory contract for the sale of land. Here, also, the decisions are in conflict. The prevailing view in this class of contracts is ably expressed by Chancellor Kent: "Nor will it do for the defendant (vendee) to say he was not satisfied with his title, without showing some lawful incumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it might be a mere pretext, and cannot be regarded." [10] This would seem to be the correct view but it is to be noted that it does not correspond to the weight of authority where the construction of the term "satisfaction" arises in a contract of employment.[11] With regard to a contract for the sale of land the courts proceed upon the theory that it must have been the intention of the parties that a valid or marketable title should be satisfactory, although the vendee would have been able to demand a marketable title had there been no mention of a satisfactory title in the agreement. It is suggested that the reason for arriving at this intention of the parties may be found in the fact that the title to land does not involve the personal taste or feeling of the vendee, whereas many contracts of employment do involve such elements.

However, there is considerable authority for the proposition that in an executory contract for the sale of land a provision that the title shall be satisfactory to the vendee, is to be construed to give the vendee an arbitrary right to repudiate the contract on the ground of dissatisfaction with the title, provided only that it be arrived at in good faith.[12] These cases must necessarily proceed on the theory that under the contract the purchaser is the person to be satisfied and to allow a jury to decide would not carry out the contract of the parties.

R. H. W.

LIBEL—IS AN UNSEALED LETTER PUBLICATION?—One of the fundamental elements which must be proved in every action or prosecution for libel or slander is the publication of the defamatory matter. In criminal indictments, it is sufficient to prove the com-

[10] Folliard v. Wallace, 2 Johns, 395 (N. Y. 1807). See also Dillinger v. Ogden, 244 Pa. 21 (1914), 37 Am. & Eng. Ann. Cas. 533; Moot v. Business Men's Ass'n, 157 N. Y. 201 (1898); Giles v. Paxson, 40 Fed. 283 (1889).

[11] For an interesting comparison of a contract to sell land and a contract of employment, see Dillinger v. Ogden, *supra,* note 10, and Corgon v. Geo. F. Lee Coal Co., *supra,* note 1.

[12] Liberman v. Beekwith, 79 Conn. 317 (1906); Hollingworth v. Colthurst, 78 Kans. 455 (1908).